STATUTE APPENDIX

Sec. 7. Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Sec. 8 (a). It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

Section. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—

> (1) to restrain or coerce (A) employees in the exercise of rights guaranteed in section 7 * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a) * * *

Sec. 9 (a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in a unit appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not * * * (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation * * *

(c) (1) Whenever a petition shall have been filed * * * [i]f the Board finds * * * that * * * a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15850

LOCAL 483, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS OF AMERICA, AFL-CIO, ET AL., *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

STANDARD OIL COMPANY OF INDIANA, *Intervenor*

CENTRAL STATES PETROLEUM UNION LOCAL 115, *Intervenor*

On Petition for Review of an Order of the
National Labor Relations Board

Decided March 2, 1961

Mr. Mozart G. Ratner for petitioners.

Mr. Frederick U. Reel, Attorney, National Labor Relations Board, for respondent. *Messrs. Stuart Rothman*, General Counsel, National Labor Relations Board, *Dominick L. Manoli*, Associate General Counsel, National Labor Relations Board, *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Herman M. Levy*, Attorney, National Labor Relations Board, were on the brief for respondent.

Mr. Karl H. Mueller for intervenor, Standard Oil Company of Indiana.

Mr. Gerard D. Reilly was on the brief for intervenor Central States Petroleum Union Local 115. *Mr. Laurence T. Zimmerman* also entered an appearance for intervenor, Central States Petroleum Union Local 115. *Mr. Fred H. Daugherty*, a member of the bar of the Supreme Court of Illinois, was allowed to appear *pro hac vice* for intervenor Central States Petroleum Union Local 115.

Before PHILLIPS, *Senior United States Circuit Judge for the Tenth Circuit*,* and PRETTYMAN and BAZELON, *Circuit Judges*.

PER CURIAM: Petitioners are Local 483, International Brotherhood of Boilermakers, et al., a craft union, and seventeen employees of the Standard Oil plant at Wood River, Illinois. They seek to set aside an order of the National Labor Relations Board which dismissed complaints against the Company and Central States Petroleum Union (CSPU), an industrial union representing the operating and maintenance employees at the Company's Wood River plant. The detailed factual situation giving rise to these complaints is fully set forth in the Board's opinion, *Local 115, Central States Petroleum Union*, 46 L.R.R.M. 1001 (1960). In essence, petitioners contend that the denial of job transfer requests by several of the individual petitioners and the layoffs of all seventeen were the result of discriminatory conduct of the Company and CSPU and constituted unfair labor practices under the National Labor Relations Act.[1]

The seventeen individual petitioners had been employed in the Company's boilermaker department and temporarily assigned to other operating and maintenance tasks.

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* Sitting by designation pursuant to Sec. 294(d), Title 28, U. S. Code.

[1] Specifically, the complaint charged Standard with violations of §8(a)(1), (2), and (3) and CSPU with violation of §8(b)(1)(A) and (2) National Labor Relations Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. §158 (1958).

In spite of their temporary jobs, the Board had determined that they were members of the boilermakers unit for purposes of the craft severance proceeding[2] initiated by Local 483. The denials of the job transfer requests occurred after the severance proceeding had been initiated but before the election. The layoffs occurred after Local 483 was successful in the election and the boilermakers unit, then represented by Local 483 instead of CSPU, was severed from the operating and maintenance unit represented by CSPU.

While the craft severance election was pending, the collective agreement between the Company and CSPU expired and a new agreement was made. This agreement, which included the seniority rules governing job transfer requests and layoffs, specifically excluded employees eligible to vote in the boilermakers unit election, including the seventeen petitioners. Accordingly, the Company subsequently denied the job transfer requests involved here.

The Board concluded that the exclusion which brought about this denial was proper in light of the policy of its *Midwest Piping*[3] rule which requires an employer faced with rival representation claims to maintain a strictly neutral position and not to bargain with any union as to the employees involved in the representation dispute. Similarly, the Board concluded that all members of the newly created craft unit, including the seventeen individual petitioners temporarily working outside of it, had only such seniority rights as their new bargaining representative obtained for them. It therefore held that the seventeen were without seniority on their temporary operating and maintenance jobs as a consequence of sev-

[2] This term, in Board parlance, signifies the removal as a result of an election of a craft group from a broader bargaining unit of which it was previously a part. See *American Potash & Chemical Corp.*, 107 N.L.R.B. 1418 (1954).

[3] *Midwest Piping and Supply Co.*, 63 N.L.R.B. 1060 (1945).

erance, and the layoffs were not occasioned by prohibited conduct.

This case reflects the difficult situations which often arise when craft severance requires readjustment of a highly complex seniority system.[4] We think the Board's resolution is a reasonable one and reflects a proper accommodation of the interests which the Act seeks to serve.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,850

LOCAL 483, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS OF AMERICA, AFL-CIO, ET AL., *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*,

STANDARD OIL COMPANY OF INDIANA, CENTRAL STATES PETROLEUM UNION, LOCAL 115, *Intervenors*

On Petition for Review of an Order of the National Labor Relations Board

Before: PHILLIPS, *Senior United States Circuit Judge for the Tenth Circuit*, and PRETTYMAN and BAZELON, *Circuit Judges*.

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[4] See Jones, *Self-Determination v. Stability of Labor Relations*, 58 MICH. L. REV. 313 (1960); Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 12, (1958).

Judgment

This case came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the order of the National Labor Relations Board on review in this case is affirmed.

Per Curiam.

Dated: Mar. 2, 1961

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,850

Local 483, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers of America, AFL-CIO, et al., *Petitioners*,

v.

National Labor Relations Board, *Respondent*,

Standard Oil Company of Indiana, *Intervenor*,

Central States Petroleum Union Local 115, *Intervenor*.

Before: Phillips, *Senior Circuit Judge*, sitting by designation and Prettyman, and Bazelon, *Circuit Judges*, in Chambers.

Order

Upon consideration of the petitioners' petition for rehearing, it is

Ordered by the court that the petition for rehearing is denied.

Per Curiam.

Dated: March 22, 1961

127 NLRB No. 31

D-1308
Chicago, Illinois

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CENTRAL STATES PETROLEUM UNION, LOCAL 115, *Respondent*

AND

GRUENBERG & SCHOBEL, *Attorneys, Charging Parties*

AND

Cases Nos. 14-CB-515, 582, 581, 604, 656

LOCAL 483, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS OF AMERICA, AFL-CIO, *Charging Party*

AND

RALPH SCHOENEWEIS, *An Individual, Charging Party*

AND

E. C. JONES, *An Individual, Charging Party*

STANDARD OIL COMPANY, *An Indiana Corporation, Respondent*

AND

Cases Nos. 14-CA-1712, 1737, 1836, 1837, 1877, 1938

LOCAL 483, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS OF AMERICA, AFL-CIO, *Charging Party*

AND

GRUENBERG & SCHOBEL, *Attorneys, Charging Parties*

AND

RALPH SCHOENEWEIS, *An Individual, Charging Party*

AND

E. C. JONES, *An Individual, Charging Party*

Decision and Order

(Issued April 15, 1960)

On March 3, 1959, Trial Examiner Thomas A. Ricci issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report and supporting briefs. On October 6, 1959, the parties participated in oral argument before the Board in Washington, D. C.

The Board has considered the Intermediate Report, the exceptions and briefs, the oral argument, and the entire record in these cases. We find merit in the exceptions and accordingly adopt the findings and conclusions of the Trial Examiner only insofar as they are consistent with our decision herein.

Background. The instant cases are an outgrowth of a representation proceeding commenced in October 1956 when Local 483[1] filed a petition with the Board to sever all boilermaker department employees from an existing operating and maintenance unit at Standard's Wood River, Illinois, refinery. (Severance petitions for other departments were also filed, but these ultimately were either dismissed or withdrawn.) When Local 483's petition was filed, and for a number of years before, all employees in the o. and m. unit, including the boilermakers, were represented by CSPU. CSPU had previously given Standard notice to

[1] The charging party Local 483, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, AFL-CIO, is referred to herein as Local 483; Respondent Standard Oil Company is referred to as Standard; and Respondent Central States Petroleum Union, Local 115 is referred to as CSPU.

terminate, effective December 27, 1956, its current collective bargaining agreement; and on the filing of the severance petitions, CSPU advised Standard that it was suspending bargaining with Standard respecting employees "involved" in the representation proceedings. Following a period of negotiation, CSPU and Standard entered into a new contract on May 3, 1957, covering employees in the o. and m. unit, but specifically excluding those "involved" in the pending representation proceedings.

Like the previous agreement, the new contract provided for the accumulation of plant, divisional, and departmental seniority, and specified how such seniority could be exercised. In essence, it was provided that every employee began to acquire plant seniority from his date of hire. On began to acquire plant seniority; an employee would begin entrance into one of the divisions, an employee would begin to acquire, in addition to his plant seniority, seniority within that division. By moving into a department, he would begin to acquire seniority within that department. An employee's seniority standing in his department, in his division, and in the plant governed both his security in his job and his opportunity to advance within his own division and department. If, in the event of a layoff within his own division or department, an employee lacked sufficient seniority to retain employment there, he could "bump back" to a "labor pool", and, by exercising his plant seniority, displace employees within the pool having less plant seniority. By exercising his plant seniority or divisional seniority, an employee could also "bid" for transfers to other jobs in other departments or divisions. Once transferred, however, an employee would lose all seniority accumulated in his former department or division, and would start anew to acquire seniority in his new department or division.

As noted, the 1957 contract excluded from its coverage all employees involved in the then pending representation proceedings. However, simultaneously with the signing of this contract, CSPU and Standard orally agreed (termed a

"gentlemen's agreement") that pending disposition of the representation proceedings, the excluded employees would be treated as though they had the same rights which they had had under the expired contract in respect to "bumping back" to the labor pool; but no agreement was made respecting any right to "bid" into other departments. Shortly after the signing of the new contract, Standard unilaterally extended to the excluded employees the wage increases and other benefits given to the covered employees.

On August 20, 1957, the Board directed an election among the boilermaker department employees (*Standard Oil Company*, 118 NLRB 1099). The election was held on September 19, 1957, and of the 22 employees then working in the boilermaker department, 19 voted for Local 483, and 3 voted for CSPU. Of the remaining 18 carried on the boilermaker seniority list, none of whom was then working in the boiler-

for CSPU. Of the remaining 18 carried on the boilermaker

seniority list, none of whom was then working in the boilermaker department, one (E. C. Jones) did not attempt to ed, and the vote, another did not vote because he had retires and the ballots of 16 were challenged by Standard. Jon sed back to boilermaker 16 challenged employees had previously bumpe the labor pool because of a slackening in b bid into the department work. ones had no

On October 24, 1957, E. C. Jones attempted to by their earlabor pool. CSPU advised Standard that Jon any bid by "bidding" rights because he was not covered by uld feel free rent contract, and that if Standard honored a compliance anyone not covered by that contract, CSPU woul to use "legal and economic remedies" to compel or concluded with the contract. Jones' bid was denied. e overruled.

On November 5, 1957, the Regional Director the Board a that the challenges to the 16 ballots should be tition, or, in On November 12, 1957, Standard filed with the arifying the motion for dismissal of the representation peti ing rights of the alternative, for a supplemental decision cla motion was Board's unit finding and defining the bargainin a certified labor organization. Standard's n

denied.[2] In February 1958, while Standard's motion was pending before the Board, Jones and other boilermakers then working in the labor pool (Schoeneweis, Best, Miller and Lankford) attempted to bid into other promotional groups and departments in the o. and m. unit. All bids were denied.

In April 1958, the Board overruled the challenges to the 16 ballots and ordered them to be counted. A revised tally of ballots showed 35 votes for Local 483 and 3 for CSPU. After the tally issued, CSPU advised Standard that when the Board certified Local 483, all boilermakers working in the labor pool would have to be replaced by o. and m. employees then in a layoff status; and if this were not done, CSPU would strike the refinery.

On April 17, 1958, the Board certified Local 483 as representative of the boilermaker unit. On that date each of the 17 boilermakers then working in the labor pool (as the result of having been bumped back) was laid off and replaced by a recalled o. and m. employee. The group laid off included 2 employees who were actually working in the boilermaker department at the time of the election, but who had been bumped back to the labor pool subsequent to that date.

On the basis of the foregoing, the Trial Examiner found that by causing Standard to layoff 17 employees on April 17, 1958, and by causing Standard to reject certain[3] bids

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[2] Standard's motion (in which CSPU subsequently joined in part) was denied on March 26, 1958.

[3] The Trial Examiner found no violation in the denial of Jones' bid of October 1957 in that the labor pool was not a department or promotional group into or out of which *any* employee could bid. The Trial Examiner also found that the denial of Miller's bid was not violative of the Act. It was conceded by the General Counsel that this employee lacked sufficient seniority even if covered by CSPU's contract to be entitled to the transfer sought.

We adopt the Trial Examiner's findings here not only for the reasons given, but for the additional reasons set forth in this decision.

of employees for transfer, CSPU violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act; and that by so laying off and denying the transfers, Standard violated Section 8 (a) (1), (2) and (3) of the Act. We disagree with these findings.

1. In finding that the layoff of the 17 boilermakers violated the Act, the Trial Examiner reasoned that because no layoffs would have been made if the boilermakers as a group had not voted for Local 483, the boilermakers were unlawfully laid off for that reason—i. e. for voting for Local 483. In our view, the Trial Examiner has oversimplified the matter and in so doing has failed to give proper recognition to the nature of a craft severance proceeding. What the Trial Examiner has interpreted as unlawful causation is, in our opinion, merely an effect of the severance action. We find, in the circumstances of this case, that severance having been effected, the craft employees had to look to their chosen bargaining representative with respect to any benefits sought to be obtained thereafter. The rejected representative continuing, however, to represent the employees in the unit who were not severed, may at times be compelled to take action on behalf of the employees it represents which may be detrimental to the severed employees no longer in its unit. Thus, in the instant case, CSPU had a contract with Standard providing for the accumulation of seniority (with attendant job security rights) by employees in the unit it represented on jobs within that unit. The provisions was a valid one.[4] We fail, therefore, to perceive how it may be held that CSPU violated the Act by merely demanding that Standard give effect to the seniority provisions of the contract.

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[4] Cf. *Local No. 6281, United Mine Workers of America*, 100 NLRB 392, 393, wherein the Board recognized that a union may strike to compel an employer to abide by contract provisions giving employees seniority rights.

We have, in reaching the conclusion that the layoffs did not violate the Act, considered the various reasons advanced by the Trial Examiner in support of his finding to the contrary. We find those reasons to be without merit. In the first place, we have, on the basis of the considera tions stated above, found that the 17 boilermakers who, after the severance election, were working in the operating and maintenance labor pool, neither had seniority status in, nor after the certification of Local 483, were members of, the o. and m. unit. We expressly reject the Trial Examiner's finding to the contrary. Secondly, and again with respect to seniority, the Trial Examiner indicated that the boilermakers had seniority status apart from any collective-bargaining agreement and that this seniority status was "acquired by grant" of Standard. The record offers no support for such a finding; but, to the contrary, establishes that such seniority rights as were possessed by an employee at any time arose out of contract between CSPU and Standard. We think it basic that seniority rights are not inherent in an employer-employee relationship.[5] The fact that boilermakers once enjoyed such rights under earlier contracts does not tend to establish that those rights continue after their contractual coverage was extinguished. Thirdly, respecting the unit status of the boilermakers, the Board did not, as indicated by the Trial Examiner, at any stage in the severance proceeding find that boilermakers would have a dual unit status, thus making them members of both an o. and m. unit and a boilermaker unit at the same time. Nor did the Board find, as suggested by the Trial Examiner, that "bumped back" boilermakers were eligible to vote in the severance election on a theory that they were "part-time" or "transient" employees. On the contrary, in its Decision (*Standard Oil Company*, 118 NLRB 1099), the Board recognized that during slack periods a boilermaker

[5] *Ford Motor Co.* v. *Huffman*, 345 U.S. 330; *Aeronautical Industrial District Lodge 727* v. *Campbell, et al.*, 337 U.S. 521, 526; *Cardenas* v. *Wilson & Co., Inc.*, 180 F. 2d 828 (C.A. 10).

might take an assignment to nonboilermaker work, but the Board specifically noted that such assignments were *temporary* and not such as would affect the status of boilermakers as true craftsmen. Thus, notwithstanding a boilermaker's temporary engagement in nonboilermaker work, he remained at all times and for all purposes a boilermaker.

We also reject the Trial Examiner's similar finding that the 17 boilermakers were in fact covered by the CSPI-Standard contract because they were engaged in o. and m. work. In this connection, we note that the contract specifically excluded all employees involved in the representation proceeding which was pending when the contract was signed. Moreover, the presence of boilermakers in the labor pool at the time of the certification of Local 483 was not by virtue of the contract, but solely by reason of the oral or "gentlemen's agreement" between CSPI and Standard to the effect that pending disposition of the representation case boilermakers would be treated as though they had the same rights which they had under the expired contract in respect to bumping back to the labor pool.

2. The Trial Examiner based his finding that Respondent violated the Act by its bid denials upon the same reasoning that underlay his finding with respect to the layoffs. For the reasons indicated, we also reject the reasoning in connection with the bid denials. Moreover, we think that the Trial Examiner erred in considering the issue of the legality of the bid denials by failing to give weight to the Board's *Midwest Piping* rule.[6] Under that rule an employer faced with rival representation claims must main

[6] *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060; reaffirmed in *Shea Chemical Corporation*, 121 NLRB 1027. In *Shea Chemical Corporation*, the Board specifically held "that upon presentation of a rival or conflicting claim which raises a real question concerning representation, an employer may not go so far as to bargain collectively *with the incumbent* (or any other) union unless and until the question concerning representation has been settled by the Board." [Emphasis supplied.]

tain a strictly neutral position, and must not bargain with an incumbent or any other union unless and until the question concerning representation has been settled by the Board. Thus, Standard, faced with a real claim by Local 483 to represent the boilermakers, could not have bargained with CSPU for these employees while Local 483's petition was pending before the Board. It follows that Standard and CSPU properly excluded the boilermakers from the coverage of their contract. Having thus been specifically excluded from the contract in accordance with a legal obligation, it would be inconsistent to assert that the boilermakers had rights (e. g., to bid into other departments) based on that contract.

3. There is another reason compelling the dismissal of the complaints. This is that there is missing here proof of an element essential to an 8 (b) (2) and 8 (a) (3) finding: intent to encourage or discourage membership in a labor organization.

Specific evidence of intent is, of course, not always essential to a showing of a violation. Thus, as the Supreme Court held in *Radio Officers'*,[7] where the employer's disparate treatment of its employees is based on union membership or lack thereof, the unlawful intent may be presumed. The governing principle in such cases as stated by the Court in that case is that "specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership. . . ."[8] On the other hand, where the employer's conduct does not inherently so encourage or discourage union membership, it is clear that the presumption does not obtain and "the necessity for independent evidence of discriminatory motivation is *not* obviated."[9]

[7] *Radio Officers' Union of the Commercial Telegraphers Union, AFL (A. H. Bull Steamship Company)* v. *N.L.R.B.*, 347 U.S. 17.

[8] Ibid., at p. 45.

[9] *Anheuser-Busch, Inc.*, 112 NLRB 686, 690.

In the *Radio Officers'* case the Supreme Court did not have before it any issue respecting disparate treatment in a situation where, as in the instant case, the union was not the exclusive bargaining agent of all employees concerned. Indeed the Court expressly stated that it was not passing upon the legality of disparate treatment in such circumstances.[10] This limitation upon the scope of *Radio Officers'* was recognized by the Board in *Anheuser-Busch, Inc.*, 112 NLRB 686, and again in *Speidel Corporation*, 120 NLRB 733. In the latter case, the Board specifically held that where the union is not the exclusive bargaining agent of all the employees, the Board may not, without reference to the employer's actual motivation, properly infer discriminatory intent solely from the disparate conduct itself. The Board further held that in such circumstances, if it is to be inferred that the employer was discriminatorily motivated, this must be done on the basis of evidence other than the disparate treatment of its employees.

In the *Anheuser-Busch* case the employer had extended an economic benefit to the employees in one bargaining unit, represented by its own bargaining representative, without according the same treatment to the employees in another separate bargaining unit, represented by another bargaining representative. The Board held that "the statutory scheme did not contemplate that disparate treatment among employees in different separate units *along unit lines* would, by itself, give rise to a finding of discrimination." Rather, the Board said, the inference of unlawful motivation must be predicated on other independent evidence.

Applying these principles to the instant cases, it is clear that the facts do not warrant a finding that there was inherent in Standard's conduct an unlawful intent to encourage or discourage membership in any labor organization. While there was differentiation in treatment between the boilermakers and the o. and m. employees, this differentiation in treatment was not based on "membership" in a

[10] 347 U.S. 17, 47.

union. Rather, it is clear, the differentiation in treatment was based on membership in a unit. Nor is there here independent evidence showing that the Respondent's action was motivated by discriminatory intent. Thus there is nothing in the record tending to prove that Standard was motivated by any unlawful animus toward Local 483 or by any purpose other than its avowed purpose--i. e., to comply with what it considered the law required and with the terms of its bargaining agreement with CSPU.

For the foregoing reasons, we shall dismiss the complaints.

ORDER

It is Hereby Ordered that the complaints be, and they hereby are, dismissed.

Dated, Washington, D. C.

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

This proceeding, with all parties represented, was heard before the undersigned Trial Examiner in St. Louis, Missouri, on November 18 through November 21, 1958, on consolidated complaints of the General Counsel and answers of Central States Petroleum Union, Local 115, herein called Local 115, CSPU, and the Respondent Union, and of Standard Oil Company, an Indiana corporation, herein variously called Standard, the Company, or the Respondent Company. The principal issue litigated was whether the Respondent Union had violated Section 8(b)(1)(A) and 8(b)(2) of the Act and whether the Respondent Company had violated Section 8(a)(2) and (3) and Section 8(a)(1). Briefs were received by the Trial Examiner from the General Counsel and both Respondents.

Upon the entire record and from my observation of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS[1]

I. The business of the Company Respondent

Standard Oil Company, an Indiana corporation, has its principal office and place of business in Chicago, Illinois. It is engaged in the business of refining, transporting and marketing petroleum and petroleum products; among other things, it operates a refinery at Wood River, Illinois. Standard annually ships products valued in excess of $50,000 across State lines.

[1] The General Counsel and counsel for the Charging Parties filed motions to correct a number of minor inaccuracies in the transcript; no objections were made thereto. The motions are granted, the motion papers are hereby made part of the record, and the record is corrected accordingly.

The parties agree, and I find, that the Respondent Company is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Statute to exercise jurisdiction herein.

II. The labor organizations involved

Central States Petroleum Union, Local 115, and Local 483, International Brotherhood of Boilermakers, Iron Ship Builders, Black Smiths, Forgers and Helpers of America, AFL-CIO, are labor organizations within the meaning of Section 2 (3) of the Act.

III. The unfair labor practices

A. *Background:*

The events giving rise to this case arose in the Company's Woods River refinery, where for many years CSPU has been the bargaining agent for a comprehensive unit of operations and maintenance employees. There came a time in 1956 when the employees in the boilermaker department, a mechanical or maintenance division group, chose to be represented separately as a craft unit. Over repeated and vigorous protests by the Company and CSPU, the Board ruled such a unit to be appropriate, held the severance election requested by the boilermakers, and eventually in 1958 certified Local 483, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers of America, AFL-CIO, herein called Local 483, as bargaining agent for the boilermaker department.[2] In keeping with a complex plant-wide system of seniority in existence for over 20 years, a number of boilermakers were "temporarily" at work in departments which remained a part of the old operations and maintenance unit. In direct consequence of the boilermakers' decision to be separately

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[2] *Standard Oil Co.*, 118 NLRB 1099; Order Denying Motions, dated March 26, 1958, unpublished.

represented by Local 483 in the boilermaker department, and pursuant to a previously announced plan, CSPU, on threat of strike, caused the Company to lay off 17 boilermakers on April 17, 1958, when the Board certificate issued. The complaint alleges (1) that such layoffs constituted discrimination by the Company in violation of Section 8(a)(3) and 8(a)(1) of the statutes; (2) that they also constituted unlawful assistance to CSPU within the meaning of Section 8(a)(2); and (3) that CSPU violated Section 8(b)(2) and 8(b)(1)(A) in causing the Company to take such action.

B. *The pertinent facts:*

1. Testimony and exhibits

The General Counsel and the two Respondents stipulated upon a 60-page "agreed statement of facts," and offered it into evidence, in place of sworn testimony, together with 52 stipulated exhibits. Counsel for the Charging Parties refused to sign the stipulation and objected to admission of both the statement and the exhibits on the grounds that much of it is immaterial, and some of its contents inaccurate. The General Counsel, without specifying, agreed that many of the exhibits, and many of the "facts" so stated are irrelevant to the issue of this case, and explained that he proceeded in this manner because the exhibits did establish those facts which he believed necessary to support the complaint. He did not, either on the record or in his brief, single out which facts, or what "evidence," should be considered pertinent. The Charging Parties and the Respondents were permitted to and did introduce evidence pertinent to the complaint.[3]

Because of the manner in which the General Counsel chose to proceed, the record contains much evidence which is argumentative or immaterial in this proceeding, and which

[3] *Borg-Warner Corporation*, 113 NLRB 152, enfd. 231 F. 237 (C.A. 7).

in substance is only an attempt to relitigate and reargue the merits of the representation case issue decided by the Board in the earlier proceeding. The Board having finally decided, after full consideration of the arguments and facts, that a "boilermaker department" unit is appropriate for bargaining purposes in this refinery, I deem that question no longer open for consideration or litigation here. Accordingly, I will set out only those facts, as to which there is practically no dispute, which bear a relationship to the issue of this case: whether the two Respondents acted unlawfully in bringing about the discrimination in the employment of 17 employees named in the complaint.

2. The Company's method of operations

The bulk of the refinery's 1300 operation and maintenance employees work in 5 divisions: heavy oil, chemicals, utilities, and mechanical division. Of these only the mechanical division is divided into departments: carpenters, storehouse, tinners, insulators, masons, welders, pipe-gang, boilermakers, painters, riggers, electricians and transportation. In addition, there is a labor pool into which employees from the various divisions or departments are transferred from time to time, and from which they are reassigned to other departments or divisions as needed.

All employees, except any that may work in the labor pool, carry a divisional designation; those who work in the mechanical division also carry a departmental designation. In some of the departments regular apprenticeship programs are carried on; in consequence, employees in such departments are also classified journeymen or apprentices.

It is a normal incident of operations of this refinery that the workload, and the consequent need for workmen, keeps changing in each division and department. To adjust to this shifting need, employees are regularly transferred among divisions and departments. This transfer is accomplished by sending employees out of their regular desig-

nated divisions or departments into the labor pool, whence they are in turn assigned out into other groups as needed. The selection of particular employees in or out of the various groups—tranfer of unneeded boilermakers, for example, out of the boilermaker department; assignment of surplus employees out of the labor pool to groups in need of more workmen; or actual layoff of employees from the labor pool when the overall needs of all five divisions are below the total manpower available—is predetermined on the basis of a long established seniority system.

Every employee has plant seniority, which starts mounting from his first day of hire. As soon as he enters one of the divisions he begins to accumulate a second prerogative—divisional seniority. If he either simultaneously or later goes into a department, he acquires and keeps adding still a third—departmental seniority.[4] Employees who have only worked in the labor pool, or who choose to divest themselves by "bidding out" of any department or division, acquire no seniority except the ever-present plant seniority.

In accordance with these established seniority rights, excess employees "bump" out of a division, or a department, into the labor pool in inverse order to their divisional or departmental seniority. From there they are entitled to assignment out of the labor pool—back into their own department or division, or into other departments or divisions where needed,—in direct ratio with their acquired divisional, departmental, or plant seniority. And finally, in the event of layoff because of too many employees accumulated in the labor pool, those with the least plant seniority go home first, and are recalled when needed in reverse order.

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[4] The record indicates, with little clarification, there is also a fourth type: promotional group seniority. This concept is sometimes interchangeable with departmental seniority and sometimes distinguishable. Its precise nature is immaterial to the issue here involved.

This system of transfer and assignment is called bumping. In addition, the same seniority measurements govern the matter of "bidding" rights which all employees enjoy. Whenever a permanent opening is posted for any division or department, again all employees who desire to enter into such department or division bid, and the seniority accumulations of each fixes the successful bidder. When an employee so bids into another group, he loses all previously accumulated lesser seniorities, and starts over again in his new department or divisional seniority. Plant seniority never changes.

3. The status of the 17 employees and the discrimination against them

On April 17, 1958, 17 employees who carried boilermaker department seniority, and therefore also divisional and plant seniority, were working in the labor pool, or on temporary assignment in other departments or divisions.[5] They had bumped, on various dates, out of the boilermaker department for lack of boilermaker work.[6] Of the 17, 3 carried 13 years of boilermaker seniority, 1 over 12 years, four 10 years, one 9 years, and the others a lesser amount. One of them had been bumped out of the boilermaker department 31 months earlier, 2 of them 2 years before, 3 of them over 1½ years, and the rest for lesser periods. On that same day, April 17, there were other employees—not

[5] The hourly rate in the labor pool itself—on strictly laborer work—seems to be the lowest in the refinery. When employees are sent out of the labor pool to other departments of the division—i.e., other than the department in which they hold their own regular seniority status—they are paid the lowest rate for that department usually the helper rate. This hourly pay is higher than the common laborer rate and therefore assignments out of the labor pool are called premium jobs.

[6] At that time 33 employees carried "boilermaker" seniority, and therefore constituted the "boilermaker department"; the other 16 were at work on regular boilermaker duties in their department.

of the boilermaker department—in laid-off status because they had less plant seniority than the 17 boilermakers. On that critical date—April 17—the Company laid off the 17 boilermakers and recalled in their place 17 nonboilermaker workmen from laid-off status.

Five of the 17 boilermakers laid off were also denied the previously enjoyed seniority rights to bid into other departments of the plant while they were working in the labor pool. On November 25, 1957, E. C. Jones attempted to bid out of the boilermaker group into another promotional group of the five divisions constituting the general operating and maintenance unit. In February 1958, Schoeneweis, Best, Miller and Lankford attempted to bid into the transportation department of the mechanical division. All of these bids were denied by the Company. If the Company had continued to accord to Jones, Schoeneweis, Best and Lankford the seniority prerogatives previously enjoyed all four of these persons would have been granted the requested permanent transfer into the other departments because their respective relative seniority sufficed.[7]

4. The cause of the discrimination

This complex system of seniority classifications and accumulations by individual employees, and the consequent bumping, assignment, bidding and layoff rights and safeguards, have been spelled out in detail in the successive contracts which Standard has had with CSPU. Their 1955 contract expired on December 27, 1956. While they bargained towards a new agreement thereafter, there was no contract in effect until May 3, 1957, when a new one was signed effective until 1959. Because of the pending craft severance representation proceeding involving the boilermaker department, the 1957 contract expressly excluded

[7] As to Miller, the General Counsel stated on the record that his seniority rating was not sufficient to win the requested transfer in any event.

from its coverage any employees affected by that proceeding. The Company and CSPU agreed thereafter, however, by letter from Standard accepted by letter from CSPU, that boilermaker employees would enjoy "the same wage increases and other working condition changes" they would have received had they been covered by the new contract. With execution of the new agreement, the parties also agreed orally that until the representation case was finally decided by the Board, the boilermakers would continue to be accorded all previously enjoyed seniority privileges to bump in and out of the labor pool as in the past. They made no separate agreement respecting any bidding—or permanent transfer—out of the boilermaker department.

It is clear that CSPU caused Standard to lay off the 17 boilermakers on April 17, 1958, and to deny the bid requests of 5 of them shortly before that date. On September 12, 1957, a week before the boilermaker department election, CSPU advised each of the boilermakers by individual letter that they would no longer be permitted to perform any work pursuant to seniority outside the boilermaker department if they voted for Local 483. CSPU also informed Standard of this position repeatedly throughout the representation proceeding, and on April 10, 1958, when issuance of the Board's April 16 certification in favor of Local 483 appeared a certainty, it wrote to the Company, saying that if the 17 employees from the boilermaker department then working in or out of the labor pool were not laid off and replaced with employees of the Operation and Maintenance Unit, "CSPU 115 would shut down the entire refinery by strike action."

As to the denial of the bids for permanent transfer by certain boilermakers, CSPU wrote the Company first on November 1, 1957, "vigorously opposing" Jones' initial bid for transfer, with the statement it "would feel free to use any . . . economic action . . ." if the bid were granted. Moreover, both Respondents admit, in the "agreed state-

ment of facts," that "Standard denied the aforesaid bid by Jones, Schoeneweis, Best, Miller and Lankford because of CSPU 115's insistence. . . ."

C. *Analysis and conclusion*

The General Counsel carefully limited his arguments to the precise scope of the issue raised by the complaint as worded. He contends no more than that deprivation of work and bidding rights to the employees named in the complaint was a discrimination against them within the intendment of Section 8(a)(3) of the Act, and that the Respondent Union's conduct in causing such discrimination was also unlawful. The Respondents insist that this proceeding also requires resolution of many more questions that, they assert, inferentially are raised by the specific complaint allegations. They call for exact pronouncements as to (1) the areas of bargaining authority in CSPU and Local 483; (2) the legal effect of future contracts which Standard might execute with these Unions; (3) and the legality of a diversity of later actions which Standard might choose to take in the regular operation of the refinery when two instead of a single union represent its employees in separate bargaining units. Asked on the record to take a firm position on these legal questions, counsel for the General Counsel refused. As a result, none of them were litigated at all. Indeed, the General Counsel also opposed the Charging Parties' attempt to enlarge the unfair labor practice allegations of the complaint.[8]

I fully appreciate, as the Respondents have repeatedly hinted throughout this and the earlier representation proceeding, that the ultimate decision in this case may inexorably lead to, indeed logically compel, further significant rulings as to the meaning of other sections of the Statute.

[8] The Trial Examiner sustained the General Counsel's objection to an offer of proof intended to show independent violations of Section 8(a)(1) by the Respondent Company.

Some of the questions which the Respondents seek to explore touch upon the fundamental nature of the collective bargaining process and of union contracts made on behalf of employees. I shall nevertheless limit my consideration of this case to the issues expressly calling for resolution by the complaint and answers. It is beyond the regular function of a trial examiner in these proceedings to pass judgment on questions not put in issue by the pleadings, on hypothetical problems, or on important matters not litigated by the parties. Declaratory judgments, or advisory opinions, are best left for the Board itself to enunciate, when it sees fit, as the body primarily responsible for interpretation of the Statute as a whole.

The facts of this case literally spell out a violation of the Statute by both Respondents. The 17 men named in the complaint were at work on April 17. CSPU wanted them removed from the work they were doing; it threatened to strike if the Company did not oblige. The Company yielded and laid them off. CSPU did this because the boilermakers as a group—including the 17—had voted for Local 483 in the severance election. Without question, had the boilermakers not voted for Local 483, CSPU would not have caused their layoff. No matter how varied or ingenious the descriptive words that may be used by the Respondents to explain their actions, nothing can alter these basic facts. No plainer violation of Section 8(a)(3) and 8(b)(2) can be stated.[9]

[9] In pertinent part, Section 8(b)(2) reads:

> It shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3). . . .

In pertinent part, Section 8(a)(3) reads:

> It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

The Respondents' defense is phrased in ambiguous and confusing words, and I do not clearly understand it. The sum total of its variously worded arguments, however, seems to be that all this necessarily flowed, or was the legal consequence of the Board's determination that the boilermakers at work in the labor pool at the time of the certification were eligible to vote in the "boilermaker department" election. From this fact it follows—they argue—that the 17 employees removed themselves from the coverage of the CSPU contract, or from any right to be represented by CSPU, and surrendered any seniority right to perform any work outside the boilermaker department. The Respondents add to these contentions the unequivocal assertion that seniority rights stem only from a collective bargaining contract; that no such employment rights exist absent such an agreement. *Ergo*, the defense concludes, the boilermakers having relinquished any rights to employment in the labor pool, they have nothing the Respondents could take away from them and there was no discrimination at all.

As the foregoing rationale proceeds, it falls into successive errors, any one of which is fatal to the entire line of reasoning.

To start with, the very use of the word "right," in speaking of the boilermakers' employment in the labor pool and the Respondents' conduct in depriving them of their earnings there, is used by the Respondents in misconception of the issue of this case. We are not concerned here with any "right" of employees to employment, in the sense that such a right might or might not be enforcible against an employer in a court of law. Such a right might arise from an employer's oral promise to give certain benefits to his employees in return for their work; it might rest upon a written individual employment contract with him; or it might be spelled out in detail in a collective bargaining agreement with the union as the agent of the employees. A better word for such employment rights might be

"claims" against an employer for failure to fulfill his obligation—whether set out by contract or made orally. But enforcement of such "rights," or "claims," are purely contractual matters, express or implied, that are irrelevant to the concern of this Statute. If an employer breaches his contract of employment, whether with the individual or through his union, he does not thereby commit an unfair labor practice. The only "right" with which this Statute is concerned, and therefore the only "right" that can be said to be involved in this case, is the "right to self organization . . . [or] to refrain . . . from . . . such activities."[10] This statutory right ought not be confused with, and is not equatable to, any right to work. In administering the Statute, the Board, through proceedings like this, protects this right of employees, and through the Appellate Court, enforces such rights. It does not concern itself with any claims employees may assert against employers for failure to live up to promises to accord privileges in return for work performed. Therefore, whether the 17 boilermakers had a "contractual right" to continue working in the labor pool, or whether that right to employment existed as a just claim of theirs against Standard apart from the contract, has nothing to do with this case. That right is not guaranteed in the Statute.

In implementation of the Section 7 right to engage in union activities, Section 8(a)(3) and 8(b)(2) impose pro-

[10] Section 7 of the Act reads:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

scriptions upon employers and unions prohibiting them from engaging in certain conduct which impinges upon that statutory right of the employees. These sections make it unlawful to discriminate against employees in their "tenure of employment or any term or condition of employment." It is not deprivation of work, in itself, that is prohibited, but any such deprivation as results, or is related to union activity.[11] Because in these sections it is a hurt to the person's employment that is outlawed, Board and court cases say they give employees a "right to work" free from unlawful discrimination. However, descriptive language in decided cases do not create rights in themselves. Such language does no more than restate the basic statutory right to form unions and to do so freely, without unlawful interference through work curtailment. If Standard in this case had deviated from the established seniority practice for economic reasons—because, for example, the type of work being performed in the labor pool and other departments had changed and the skill of the boilermakers was inadequate—the layoffs might have been in violation of the CSPU contract, or of an implied promise to the boilermakers, but they would not have constituted unfair labor practices under the statutory prohibitions underlying this case. Redress for layoffs in such a case would not rest with the Board, but with the regular courts of law. No economic justification is urged in this case. Admittedly, the discrimination, the layoff and the departure from the established seniority system, were imposed upon the boilermakers because of the way they had voted in the election.

Elsewhere in their briefs the Respondents rephrase their main argument by saying that apart from a collective bargaining contract an employee can not consider seniority, with its usual attendant preferences against layoffs, as a

[11] *The Radio Officers' Union of the Commercial Telegraphers Union, AFL v. A. H. Bull Steamship Company* v. *N.L.R.B.*, 347 U.S. 17.

condition of his employment.[12] The reported decisions on which they rely support only one-half of their broad statement. The courts have indicated that seniority rights are not inherent characteristics of employment as such.[13] This does not mean to say, however, that when an employer sees fit, for business or moral reasons sufficient to itself, to grant and make seniority prerogatives a condition of employment or an element of compensation for faithful work performed, the resultant seniority rights relate any the less to "tenure of employment" as the phrase is used in Section 8(a)(3) of the Act. No case need be cited for the proposition that an employer violates Section 8(a)(3) when, contrary to his past seniority practices, he lays off an employee out of term because of his union activities; and most of the decisions in which the Board found such unfair labor practices were situations where there had been no union in the picture at all. Indeed, a seniority status, acquired by grant of an employer by virtue of long employment, is literally a "tenure of employment" and therefore an area in which the Statute prohibits discrimination by an employer. Compare: *Pacific Intermountain Express Co.*, 107 NLRB 837. The fact of discrimination against the 17 boilermakers is the clearest matter established by this record.

Still another contention is made in defense, one which is phrased in different words but which I view as another attempt to urge the same basic argument discussed above.

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[12] Thus, CSPU's attorney stated at oral argument: "in the absence of seniority provisions the employee has no job rights whatever."

[13] *Trailmobile Co.* v. *Whirls*, 331 U.S. 40; *Ryan* v. *New York Central Railroad*, 267 Michigan 202; *Garigan's Bookbinders Union*, Pa. Sup. Ct., 43 LRRM 2348. These cases, and others cited by the Respondents (*Ford Motor Co.* v. *Huffman*, 345 U.S. 330; *Aeronautical Industrial District Lodge 727* v. *Campbell, et al.*, 337 U.S. 521), relate to other statutes. They are all inapposite here for the further reason that none involved collective bargaining agreements which attempted to discriminate against particular employees *embraced within the bargaining unit* on the basis of their union activities. [Cf: *Gaynor News Co., Inc.* v. *N.L.R.B.*, 347 U.S. 17.

The Respondents advance the theory that when the boilermakers voted for Local 483, or when the Board held all boilermakers—including the 17—eligible to vote for that union, all of these employees could only thereafter be represented by Local 483, could not be covered by the CSPU contract, and could not legally look to CSPU's assistance in continuing to enjoy their employment tenure—or seniority prerogatives—in the operating and maintenance unit. Precisely by what reasoning these blanket statements not supported by any decisional authority or express statutory language—serve to excuse the otherwise clearly unlawful acts committed by the Respondents, is nowhere explained.

The Respondents appear to misconceive the purport of the Board's unit determination in a representation case. The Board does not include in the bargaining unit particular individual employees, but joins instead particular jobs. The common denominator which serves to unite a group for bargaining purposes—called community of interest by the Board—is found in the various aspects of the work which job classifications or descriptions call for. The unit is not determined by common characteristics found in the individual employees who chance, at any given moment, to occupy these jobs. Where, for example, the Board examines among other things the skill or perhaps journeyman status which the employees possess, it does so only because in this manner is revealed the skills required to do the work in the *jobs* involved. And again, it is the job which is of concern in the unit arrangement; not the named individuals at work.[14]

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[14] *H. P. Wasson and Co.*, 105 NLRB 373: "... the Board's unit delineations are based on *functionally* related work categories, and all employees performing like work are necessarily included in the unit regardless of their tenure of employment." See, also, Sixteenth Annual Report of the National Labor Relations Board, page 120: "Our unit finding is based upon functionally related occupational categories, and all employees working at jobs within the unit are necessarily included and *entitled to representation*, irrespective of the tenure of their employment." [Emphasis supplied]

It is for this reason that a union selected by the majority of employees at work on election day remains the bargaining agent of employees who enter the unit in normal turnover later. Indeed, the same single job can be held successively by any number of employees over a given period and the union always bargaining for the job, regardless of change in incumbent. Similarly, the Board holds elections even knowing of anticipated expansions of the employee complement in the unit. The reason here is because the jobs which additional employees will hold are of the same kind as those included in the unit found appropriate. Restated: the jobs are included—not the individual employees.

Pursuant to these basic principles of Board law in the field of representation cases, on April 16, 1958, when the Board certified Local 483 as the bargaining agent for the "boilermaker department," it meant that thereafter that union would bargain with the Company concerning "rates of pay, wages, hours of employment and other conditions of employment" applicable to work, or jobs in the boilermaker department. By like reasoning, CSPU remained the bargaining representative for all jobs still falling in the existing operations and maintenance unit, including all labor pool jobs and all premium jobs in areas outside the boilermaker department. And as the 17 boilermakers at issue were then working in jobs for which CSPU was bargaining agent, they were, to the extent that they had a vested employment in those jobs, entitled to be represented by CSPU.

Nor is the foregoing fundamental principle inconsistent with the fact that a union represents employees. It speaks to the employer on behalf of the individual workmen who occupy the jobs inside the unit at the time of negotiations. As collective bargaining essentially concerns itself with the employee-employer relationship—or the conditions of employment—necessarily the union becomes the spokesman of

employees. But while the unit must have a stability in terms of job or departmental setup, it need not be and rarely is static in terms of employee complement. And so the selection of the union—what the Board calls resolution of the question concerning representation—must also be determined by reference to the existing complement of employees at a given moment. Eligibility therefor merely means—as the standard Board formula reads—that a person in fact occupies an included job at that time, or works in it with sufficient frequency or for sufficient periods of time to have enough interest in the question of whether or not bargaining for that job should be collective or by individuals.

A regular part-time employee votes—and is said, loosely, to be included in the unit—even though he spends the major portion of his time working elsewhere.[15] Another person, who occupies one of the individual jobs only sporadically or casually, does not vote.[16] But both the casual and part time worker, like the regular full-time man, are included in the unit in the sense that when they do find themselves occupying an included job, they are represented by the union for such employment within the unit.

And, finally, the Board has expressly applied these same principles to those instances, like the situation here presented, where the part time, or transient employee—so to speak—spends all of his time with a single employer although part of such time is in the bargaining unit in question.[17] That all this adds up to a conclusion that the 17 boilermakers were properly included in both the boilermaker department unit of Local 483, and in the operations and maintenance unit of CSPU, is conclusively shown by direct analogy to the Board's decision in *Kennecott Copper Cor-*

[15] *Evening News Publishing Co.*, 93 NLRB 1355.

[16] *F. B. Silverwood*, a corporation d/b/a *Silverwood's*, 92 NLRB 1111.

[17] *The Ocala Star Banner*, 97 NLRB 384.

poration, 106 NLRB 390, where the Board held a named employee eligible to vote in each of two severance craft voting groups.[18]

A last contention of the Respondent is that the 17 boilermakers had been excluded from the current CSPU contract, and that because this was done pursuant to Board law, there were no seniority privileges remaining to them.[19] This argument is wedded to the same fallacy underlying the earlier contentions. It is not directly named individuals, personally identifiable at a given moment, who are covered by a collective bargaining agreement, but jobs, or employee classifications. What the parties excluded therefore from their contract coverage was boilermaker work, or jobs, and, in consequence, all employees engaged in such work. They did not, and could not, exclude the labor pool jobs, or the premium jobs then held by the 17 employees named in the complaint. And with the jobs always go the people who are at work.

In any event, however phrased—as an exclusion of 17 employees from the CSPU contract coverage, as a disparate

[18] To the same effect, *Hunt-Van Buren Co.*, 122 NLRB No. 111, where a temporary guard was permitted to vote in the production and maintenance unit. The Board said "... Akin, so long as he performs any guard duties, will not be in the production and maintenance unit and, during that period the Petitioner, if certified as a result of this election, may not bargain for him. It is only at such time as he is relieved of his guard duties and returns to his regular job within the unit that the Petitioner, if certified, may represent his interest."

[19] In accordance with the rule of *Midwest Piping*, 63 NLRB 1069, reaffirmed recently in *Shea Chemical Corp.*, 121 NLRB No. 1027. Standard and CSPU suspended their practice of bargaining for boilermakers during the pendency of the craft severance representation proceeding. Therefore, the recognition clause of their 1957 contract, in effect when the 17 were laid off, reads "... exclusive of all employees involved in the representation cases Nos. 14-RC-3118 [Boilermakers] and 14-RC-3120 pending before the National Labor Relations Board."

treatment of a class of employees included in the bid" represented by CSPU, or at a lesser denial of employment. It is clear that CSPU caused the Company to remove the 17 employees from their jobs solely because they had elected to be represented by Local 18 in their boilermaker work assignments instead of by CSPU. This was a discrimination against them in their "terms of employment" which the Statute forbids.

All of the foregoing reasoning applies equally to the Respondents' rejection of bids by four of these employees (Jones, Schoeneweis, Best and Landforce) for permanent transfer into departments other than boilermaker.[2] In November 1957 and February 1958, when they bid for job openings posted by the Company, they were at work on jobs included in the operation and maintenance unit represented by CSPU. It was an incident of their employment—a benefit accorded by the Company, and codified in the CSPU contract which related to their labor pool jobs,[3] that they were compensated in part by the privileges of bidding into other jobs inside the bargain

[2] It was not shown that Miller had sufficient seniority in February 1958 to be entitled to the transfer he bid for, and the General Counsel conceded he had too little. I therefore find no support for the complaint allegation that denial of Miller's request was an unfair labor practice.

The complaint also alleges the commission of a separate unfair labor practice in the denial of E. C. Jones' request, in November 1957, to be transferred out of the boilermaker department into the labor pool, which is not a department or promotional group at all. There is no proof in the record that such mere relinquishment of seniority or departmental classification was provided for in the established system, or that the Company had ever accorded such privilege to its employees. Asked by the Trial Examiner at the hearing to explicate his theory of the complaint at this point, the General Counsel deferred a reply for his brief, the brief does not touch upon it. I find this allegation of the complaint also unsupported by the proof.

[3] *J. I. Case v. N.L.R.B.*, 321 U.S. 332.

ing unit, in addition to the relative protection against layoff assured by their plant seniority. All the employees were aware of CSPU's announced intention to force the Company to lay off a number of labor pool employees carrying boilermaker seniority, and it may well be that these four were seeking only to avoid the economic hurt which eventually hit them. The material value of particular benefits received in return for employment are not for me to assess. It suffices, for purposes of resolving the issue raised in the complaint, that these employees had long enjoyed such bidding or transfer privileges in their employment, that such established benefits were taken from them, and that the reason was one proscribed by the statute.

On the issue raised by these rejected bids, I cannot escape the conclusion which logically flows from the reasoning and decisions discussed above. In effect, the Respondents urge a contrary conclusion because, in their view, by like reasoning the Board would be compelled to rule that boilermakers who never previously had been assigned out of boilermaker work could also bid out of their department to permanent positions in the operations and maintenance unit, and to displace employees with greater seniority there. And they may be correct. Indeed, the record also shows that "boilermakers," while working in a labor pool, retain the established right to do a proportionate share of any overtime work that may be needed from time to time in the boilermaker department. The Respondents ask whether their past practice must continue despite the change in the collective bargaining situation now with two separate units in place of the old single one. These last questions, and others of like kind, are not in issue in this case and need not be answered by me. The Board has recognized that the entire principle of craft severance gives rise to problems; it did not deem that fact sufficient to deny elections in such

cases.[22] It is to be expected that in some cases the resulting problems will be few and minor and in others they may be multiple and aggravated. The wisdom of the Board's rulings, and of its case to case application of overriding basic principles, are not for me to criticize.

Accordingly, in view of the foregoing, I find that by causing Standard Oil Company to lay off the employees named in the complaint, and in causing the Company to reject the bids of four of them for permanent transfer, the Respondent Union violated Section 8 (b) (2) and 8 (b) (1) (a) of the Act, and that by so laying off those employees and denying transfers to four of them, the Respondent Company violated Section 8 (a) (1), (2) and (3) thereof.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondents set forth in Section III above, occurring in connection with the operations of the Company set forth in Section I above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening commerce and the free flow of commerce.

The Remedy

Having found that the Respondents have engaged in certain unfair labor practices, I will recommend that

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[22] See *American Potash & Chemical Corp.*, 107 NLRB 1418, 1422:

> . . . we have given grave consideration to the argument of employer and union groups that fragmentation of bargaining units in highly integrated industries which are characteristic of our modern industrial system can result in loss of maximum efficiency and sometimes afford an opportunity for jurisdictional disputes as to work assignments. We are cognizant of the disruptive economic and social conditions that can and sometimes do occur as the result of craft existence in industrial plants.

they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I will recommend that the Respondent Union cease and desist from causing or attempting to cause Standard Oil Company to lay off or to deny employment or transfer to its employees because they choose to be represented, in any aspect of their work, by a union other than the Respondent Union.

I will also recommend that the Respondent Company cease and desist from laying off its employees, or otherwise discriminating against them in their employment because they choose to be represented, in any aspect of their work, by a union other than the Respondent Union.

I will also recommend that the Respondent Company be ordered to offer to the employees listed in Appendix A attached hereto immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges.

I will further recommend that the Respondents jointly and severally make whole the employees listed on Appendix A for any loss of pay they may have suffered by reason of the discrimination against them, by payment of a sum of money equal to the amount they normally would have earned as wages from the date of their layoff to the date of the offer of reinstatement, less their net earnings during said period, with back pay computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth*, 90 NLRB 289, 291-294. I will also recommend that the Respondent Company make available to the Board upon request, payroll and other records to facilitate the determination of the amounts due under this recommended remedy. Respondent Union shall not be liable for back pay accruing 5 days after it shall have notified the Respondent Company in writing that all objections to the employment with full seniority rights of these employees have been

withdrawn and that it formally requests their reinstatement.

In view of the nature of the unfair labor practices committed the commission of similar and other unfair labor practices reasonably may be anticipated. I shall therefore recommend that the Respondents be ordered to cease and desist from in any manner infringing upon the right guaranteed to employees under the provisions of the Act and from further discrimination against employees.

Upon the basis of the foregoing findings of fact and upon the entire record of the case I make the following:

Conclusions of Law

1. Central States Petroleum Union, Local 115, is a labor organization within the meaning of Section 2 (5) of the Act.

2. Standard Oil Company, an Indiana Corporation is an employer within the meaning of Section 2(2) of the Act.

3. By causing the Company to discriminate against the employees named on Appendix A attached hereto, in violation of Section 8(a) (3) of the Act, Respondent Union has engaged in unfair labor practices within the meaning of Section 8 (b) (2) of the Act, and has restrained and coerced those employees in the exercise of their rights guaranteed in Section 7 of the Act and has thereby engaged in unfair labor practices within the meaning of Section 8 (f) (1) (A) of the Act.

4. By laying off the employees named on Appendix A on April 17, 1958, and by denying transfers to some of its employees, at the request of the Respondent Union, the Respondent Company has encouraged membership in the Respondent Union in violation of Section 8 (a) (2) of the Act, and has discriminated against them in violation of Section 8 (a) (3) thereof.

3. By such discrimination, Respondent Company had interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices violative of Section 8 (a) (1) of the Act.

The aforesaid unfair labor practices affect commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

On the basis of the foregoing findings of fact and conclusions of law, I recommend that:

1. Central States Petroleum Union, Local 115, its officers, agents, representatives, successors and assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Standard Oil Company, or any other employer to lay off employees or in any other manner discriminate against employees, in violation of Section 8 (a) (3) of the Act;

(b) In any other manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, including the right to refrain from engaging in any or all the activities guaranteed thereunder, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Notify the Company in writing that it withdraws all objections to the employment of the employees listed on Appendix A and to their assignment or transfer to jobs in accordance with previously enjoyed seniority rights, and that it requests the Company to offer them immediate and full reinstatement to their former or substantially equivalent positions:

(b) Jointly and severally with the Company make whole the employees listed on Appendix A for any loss of pay they may have suffered by reason of the discrimination against them, in the manner set forth in Section entitled, The Remedy;

(c) Post at the business office of Respondent Union and at all places where notices to stewards and members are customarily posted, copies of the notice attached hereto as Appendix B. Copies of this notice will be furnished by the Regional Director for the Fourteenth Region, and after being duly signed by Respondent Union shall be posted by it immediately on receipt thereof, and be maintained for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by said Respondent to insure that such notices are not altered, defaced, or covered by any other material;

(d) Mail to the Regional Director for the Fourteenth Region signed copies of Appendix B, for posting, Respondent Company willing, at the latter's place of business in places where notices to employees are customarily posted;

(e) Notify the Regional Director for the Fourteenth Region, in writing, within twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order what steps have been taken by said Respondent in compliance therewith.

II. Standard Oil Company, its agents, successors and assigns, shall:

(1) Cease and desist from:

(a) Encouraging membership in or assigning Central States Petroleum Union, Local 115, or any other labor organization of its employees, by laying off employees because they choose to be represented, in any aspect of their work, by a union other than said Local 115, or by discriminating in any other manner in regard to hire or tenure of employ

ment or any term or condition thereof, except as authorized by Section 8 (a) (3) of the Act;

(b) In any other manner interfering with, restraining, or coercing employees in the existence of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

(2) Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Offer to the employees listed on Appendix A immediate and full reinstatement to their former or substantially equivalent position without prejudice to seniority or other rights and privileges in the manner set forth in the section above entitled "They remedy";

(b) Jointly and severally with Central States Petroleum Union, Local 115, make whole the employees listed on Appendix A for any loss of pay they may have suffered by reason of the discrimination against them, in the manner set forth in the section of this Intermediate Report entitled "The remedy";

(c) Preserve and make available to the Board or its agents, upon request, for examination and copying all payroll records, social security payment records, timecards, personnel records or reports, and all other records necessary to determine the amount of back pay due under the terms of these recommendations;

(d) Post at its place of business at Wood River, Illinois, copies of the notice attached hereto and marked Appendix C. Copies of said notice, to be furnished by the Regional

Director for the Fourteenth Region, shall, after being duly signed by Respondent Company be posted by it immediately upon receipt thereof and maintained for at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Company to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Fourteenth Region, in writing, within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order what steps it has taken to comply herewith.

It is further recommended that unless the respective Respondents shall, within twenty (20) days from the receipt of this Intermediate Report and Recommended Order, notify said Regional Director, in writing, that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring them, or any of them, as the case may be, to take the aforesaid action.

Dated at Washington, D. C., this 3rd day of March 1959.

/s/ THOMAS A. RICCI
Thomas A. Ricci
Trial Examiner

APPENDIX A

KENNETH BEST
GEORGE A. CLAYTON
VICTOR COUCH
J. D. EVANS
FLOYD FRIEDLINE
SAMUEL R. GUARINO
MARION HOOPER
E. C. JONES
JOHN KLADAR
J. A. LANKFORD
JACK LAVITE
FRED G. MARCH
RALPH L. MILLER
RALPH RAMSIER
RALPH SCHOENEWEIS
GEORGE STIMAC
CHARLEY TOWEY